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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. [redacted] 314

NEVILLE CHEMICAL COMPANY, Petitioner,

v.

UNION CARBIDE CORPORATION, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

COUNTER-STATEMENT

Three corrections should be made to Neville's Statement of the Case:

1. Neville seeks to prejudice the Court against Carbide by asserting that Carbide "deliberately" introduced a contaminant into the chemical it was selling to Neville (p. 3). This Neville does both because it expects that a "deliberate" tortfeasor will receive a harsher treatment from the Court, and because its cited cases indicate that a looser standard of damages may be required where the act is willful (Petition, p. 8).

The fact is that while Carbide did include the harmful substance along with many other substances in the chemical, it did not know that it was a contaminant or that it would cause harm to Neville (R. 886a-899a, 906a-907a, 915a-924a, 930a-936a, 1141a-1144a, 1155a; Pl. Ex. 120, R. 913a, 2621a-2622a). Indeed, the trial judge refused to allow Neville to allege wanton misconduct (R. 1381a, 2518a-2519a), and Neville failed to appeal from this ruling.

2. Neville asserts that it lost some customers as a result of the defective products and that it "thereby" lost substantial profits (p. 4). However, none of the customers testified as to what its requirements were during the years for which Neville claimed lost profits. Nor did the customers accounting for the major portion testify as to any facts from which those requirements could have been approximated or even imagined. Nor was there any evidence as to what Neville could have sold the product for nor what it would have cost Neville to produce it. The whole claim for speculative lost profits from speculative lost sales is simply a mass of assumptions, interpolations and extrapolations (R. 2365a-2368a, 2372a-2376a, 2381a-2391a, 2401a-2407a, 2419a-2424a, 2431a-2439a; Pl. Ex. 226, R. 2507a, 2625a).

3. Neville says that the reason the Court of Appeals vacated the damages award with respect to customer settlements was that the instructions to the jury did not limit recovery to sums paid customers for which Neville was legally liable (p. 5). That was one reason. But the Court of Appeals also gave four additional reasons: (a) "Nor was there an instruction to the jury as to the basis on which Neville could have been liable" (p. 77); (b)

"The charge incorrectly emphasized that Neville could be reimbursed for sums 'reasonably' and in 'good faith' paid" (p. 78); (c) "In addition, the jury was incorrectly charged that . . . the burden of proof shifted" (p. 78); and (d) "In addition . . . the jury must also decide whether Neville was legally liable for each type of damage" (p. 78), 422 F. 2d at 1223-1224.

ARGUMENT

Neville makes no attempt to comply with Rule 19 (1) (b) so as to show that the Court of Appeals has failed to follow state law on an "important" question. The Court of Appeals concluded that in this diversity action it should apply Pennsylvania law (p. 48), and this Neville does not dispute. But in its "Questions Presented" (p. 2), Neville seems to believe that this Court should take the time to review every decision of every Court of Appeals whenever state law is being applied. The word "important" in Rule 19 (1) (b) is not to be so easily ignored.

In any event, the Court of Appeals squarely followed Pennsylvania law on the two "Questions Presented."

Neville questions whether it is necessary in Pennsylvania that a buyer of defective product, seeking to recover sums paid its customers in settlement of claims, must show that it was "legally liable" (p. 2, Question 1). It is. *Martinique Shoes, Inc. v. New York Progressive Wood Heel Co.*, 207 Pa. Superior Ct. 404, 408-409, 217 A. 2d 781, 783 (1966), following a 1939 Pennsylvania Supreme Court decision, holds that "it must appear that the party paying was *himself legally liable.*" (The full quotation by the Court of Appeals is in the Petition, pp. 74-75). For Neville to argue that "this view frustrates the rule of law compelling mitigation of damages" and will "discourage *bona fide* efforts toward settlement" (p. 7) simply amounts to Neville saying that it does not like the Pennsylvania rule of law. But, as noted by the Court of Appeals (p. 74), the "parties are in agreement that the rule on indemnity in Pennsylvania is

stated in *Martinique*" 422 F. 2d at 1222. By this agreement and by *Martinique* Neville is bound.

Neville also claims that the Court of Appeals should not have denied it the profits it claims it would have realized, not from the sale of the particular goods, but from possible future sales (pp. 8-9). In denying such damages the Court of Appeals followed three Pennsylvania cases which Neville seeks unsuccessfully to distinguish:

1. *Harry Rubin & Sons, Inc. v. Consolidated Pipe Co. of America,* 396 Pa. 506, 512-513, 153 A. 2d 472, 476 (1959) denied "a recovery for loss of good will occasioned . . . by nondelivery of . . . goods" (Petition, p. 81). Neville says the case is not in point because Rubin was a retailer (p. 8); we do not see why this should matter, but in fact Rubin was a wholesaler. And Neville says the case is inapposite because Rubin could not "show that it lost specific sales as a result of the breach" (p. 8), but the reason it could not was that the court had sustained preliminary objections to the complaint and so the case had not gone to trial (Petition, p. 32).

2. *Michelin Tire Co. v. Schulz,* 295 Pa. 140, 144, 145 A. 67, 68 (1929) held that when a buyer of defective goods "lost customers, which otherwise he would have retained and whose business would have netted him a profit", the claim "is entirely too speculative and not the proper measure of damages" (Petition, p. 81). While the court did state that Schulz had not named the customers, as Neville says (Petition, p. 8), a reading of the opinion shows that this was an alternate ground for the decision, and that the language quoted by the Court of Appeals (Petition, p. 81) is the law of Pennsylvania.

Indeed, the buyer in the *Michelin* case was prepared to prove more than Neville, because that buyer said he would show "the exact amount of business that appellee would have received . . ." (Brief for Appellee in *Michelin* case, p. 8). On the other hand, not one of Neville's customers stated how much business it transferred to other suppliers, so that not only were Neville's profits speculative but so also were its sales.

3. *Kassab v. Central Soya,* 432 Pa. 217, 237, n. 12, 246 A. 2d 848, 857, n. 12 (1968), states that a "good will loss is too speculative" when arising from a "seller's defective product" (Petition, p. 82). Neville seeks to dismiss the case on the sole ground that "the statements in that footnote were *dictum*" (Petition, p. 8, n. 3). We agree that they were *dicta,* but they represent the 1968 thoughts of the Pennsylvania Supreme Court as to the meaning of its 1929 and 1959 decisions in *Michelin* and *Rubin.*

Accordingly, the Court of Appeals, in seeking to decide the present question of Pennsylvania law as the Pennsylvania Supreme Court would have decided it, was fully justified in relying on all three cases. Its decision was not only a reasonable and permissible interpretation of Pennsylvania law, but was mandated by it.

CONCLUSION

For the foreging reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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